BRIEF IN SUPPORT OF THE PETITION.

Inasmuch as the U. S. C. C. A. 3d C. has not filed any memorandum or opinion in support of its orders, of October 10, 1941 (filed within two hours after the conclusion of the oral argument on the appeal), and of October 30, 1941, but has contented itself with a per curiam order only, affirming the order of the District Court, from which the appeal was taken, and a simple "Denied", to petitioner's petition for a rehearing, petitioner submits herewith copies of his "Brief for Appellant and Appendix" and "Petition for rehearing", and prays that they may be incorporated herein by this reference thereto.

Petitioner would, in particular, refer to pages 10 and 11 of that "Brief" for a graphic presentation of the basic and fundamental errors involved in the "unseemly conflict of jurisdiction" for the factual basis for this petition.

1. THE STATE COURT'S JURISDICTION WAS PRIOR IN TEMPORE AND THEREFORE PRIOR IN JURE, AND EXCLUSIVE, TO THE END OF THE CASE.

The Facts.

(a) The escrow agreement of October 18, 1923 was *induced* by debtor's representation that *no bankruptcy proceeding was contemplated* by him, as required of him by the escrowee, the company insuring the title to the land sold and conveyed on that date.

App. pp. 11a, 12a; R. 285/1937 pp. 6-8.*

* "App."—is to Appendix throughout.
285/1937 is to Transcript of Record to 285/1937 in U. S. S. C. throughout.

(b) The attachments *sur* execution, issued on the three judgments on November 6, 1923 and served by the Sheriff of the state court on November 7, 1923, drew the fund into the possession of that court and gave it, under the rule of comity, complete and exclusive jurisdiction over the *res* (fund and judgment liens) and the parties, as of that date,

prior

to the debtor's being adjudicated a voluntary bankrupt, on November 9, 1923.

App. p. 12a; R. 285/1937, pp. 100-101.

(c) It was solemnly and expressly conceded by the trustee in his answer filed in the state court on September 5, 1930.

R. 285/1937, pp. 257-8. app. 10a

(d) It was recognized by the referee in,—

(1) his instructions to the trustee, to get possession of the fund, on December 19, 1923

App. p. 13a; R. 285/1937 p. 30;

(2) his order on trustee to release the fund *pro tanto,* to pay the $3,000. judgment—on December 24, 1924.

App. p. 13a (7); R. 285/1937, pp. 14-17.

The Law.

Peck v. Jennes, 7 How. 612, 625;
Taylor v. Carryl, 24 Pa. 259, 20 How. 584, the famous "Royal Saxon" case;
Palmer v. Texas, 212 U. S. 118;
Taubel v. Fox, 264 U. S. 426, 432-6;
Harrison v. Chamberlin, 271 U. S. 191, 193.

2. THE RESTRAINING ORDERS WERE IMPROVIDENTLY GRANTED,

because—

(a) the trustee had equal, and more protection under the state court's *prior* "stay orders", allowed by it on January 28, 1927 and continued indefinitely, on February 11, 1927, on trustee's petition therefor.

App. pp. 13a-14a; R. 285/1937, pp. 132-169, 218, 224, 396, 401-2.

(b) they were *ultra vires,* under the rule of comity:—

Tenn. Marble Co. v. Grant, 135 F. 322 (Dallas, J. in U. S. C. C. A. 3d C.);

Dayton Coal & Iron Co., 291 F. 390 (Sanford, D. J. in 6th Circuit);

Martin v. Oliver, 260 F. 89, 93-96 (Sanborn, J. U. S. C. C. A. 8th C.);

Amn. Surety Co. v. Baldwin, 287 U. S. 156, Brandeis, J. (from U. S. C. C. A. 9th C.).

(c) they were induced by a non-disclosure of the exact facts in this litigation in the state court. Censured by Taft, C. J. in

Harkin v. Brundage, 276 U. S. 36, 55.

App. p. 14a (11), 38a-40a; R. 285/1937, pp. 130-138, 246 (22).

3. THE PURPOSE OF THE RESTRAINING ORDERS BECAME MOOT ON JULY 18, 1930, WHEN THE STATE COURT VACATED THE ATTACHMENTS SUR EXECUTION ON THE TRUSTEE'S OWN MOTIONS. THE ORDERS READ, "IT IS ORDERED THAT FURTHER PROCEEDINGS TO ENFORCE" THE ATTACHMENT EXECUTIONS ON THE JUDGMENTS "BE STAYED".

App. 39a (f); R. 285/1937, pp. 130, 192-3, 370-1.

Their continuance by the federal court after 1930, therefore, was and is vain and oppressive, under the peculiar circumstances of this case, with its unseemly conflict of jurisdiction, brought about by the lack of that "utmost good faith and fullest disclosure" of the "exact facts relevant to the litigation" in the proceedings in the federal and state courts—in the one cause—and improperly motivated, as the record abundantly shows.

App. pp. 4a-10a, 39a-40a (5).
Harkin v. Brundage, supra.
Vid. Argument in brief submitted in this case, to the U. S. C. C. A. 3d C., pp. 14-16.

4. THE REFEREE'S ORDERS OF SEPTEMBER 28, 1926 (ALMOST 3 YEARS AFTER DEBTOR'S BANKRUPTCY ADJUDICATION ON NOVEMBER 9, 1923) WERE ULTRA VIRES AND VOID,

because—

(a) Sec. 23 of the Bankruptcy Act was wholly disregarded in the referee's use of a *summary proceeding,* to pass upon the validity of judgment liens in the State court, with full knowledge on his part of the possession of the

fund by and complete jurisdiction over it and lands of debtor, vested first in the State court.

Taubel v. Fox, 264 U. S. 426, 429, 432-6;
Standard Gas & E. Co., Hastings v. Bylesby & Co. et al., 119 F. (2nd) 658, 661 (C. C. A. 3rd C.).

(b) The referee failed to give petitioner a "day in court" in defense of his judgment liens, as required by the 5th and 14th Amendments to the U. S. Constitution and his own rulings during the prolonged hearings before him.

R. 285/1937, pp. 79-87.

(c) The referee heard and considered testimony upon the plea of want of consideration for judgment notes under seal—not permissible in Pennsylvania law;

Killeen's Est., 310 Pa. 182, 187;
Commissioner of Int. Revenue, 113 F. (2nd) 352, 353, (C. C. A. 3rd C.).

(d) The referee in adjudging void two judgments (after directing payment of the 3rd by the escrowee) used testimony of a witness, subpœnaed under Sec. 21a of the Bankruptcy Act—as to the *"acts, conduct and property" only,* but *res inter alios acta* so far as petitioner's rights were concerned.

Jarvis, Trustee v. Bell, 296 Pa. 568, 574;
Re *Y. H. & T. Trade Co.,* 288 F. 507, 513.

(e) When measured or weighed by the standards of Pennsylvania law, all the testimony used by the referee was clearly insufficient to justify the opening of these judgments and declaring them void. As against the bankrupt's oath was arrayed that of the legal plaintiff in the judgment

notes, corroborated and supported by concededly genuine and credible documentary evidence and the notes under debtor's seal—"never enough to open a judgment on a note under seal".

Rice—P. J. in *Shannon v. Castner,* 21 Pa. S. C. 294, 320;

Warren Sav. B. & L. v. Foley, 294 Pa. 176, 184, 185.

(f) The lower district court did not in any direct, clear and precise way affirm these orders of the referee. "Squinting" opinions only, apparently affirmed them and the final orders of January 31, 1928 (Dickinson J. Appendix p. 35a) were most anomalous and irregular, in no wise in any proper sense judicial, reasoned ones but judicial fiat.

App. pp. 3a, 4a.

(g) These judgments were Pennsylvania liens upon real estate and by the escrow agreement subjected by the parties to that State's law to "settle defendant's (debtor's) objections" to their validity—*prior* to debtor's recourse to the federal bankruptcy court. The bankruptcy court's duty was to follow that State's local law.

Klaxon Co. v. Stenton Mfg. Co. (June 2, 1941), *U. S. S. C.* Adv. Op. 969, 971, approving *Erie R. R. Co. v. Tomkins,* 304 U. S. 64.

The *forum* and "appropriate proceeding" had also been made *res judicatæ* by the State court, in its findings and orders of January 28, 1927, a year prior to the orders of January 31, 1928 (Dickinson, J.) so irregular and ununderstandable as the last federal district judge (Kirkpatrick) concedes.

App. p. 35a.

5. THE COURSE PURSUED BY THE TRUSTEE, WITH THE PURPOSE OPENLY AVOWED BY HIS COUNSEL, WAS A CONTEMPTUOUS DISREGARD OF REGULAR AND ORDERLY PROCEDURE IN BOTH THE FEDERAL AND STATE JURISDICTIONS, WORKING A CONFISCATION OF VALUABLE PROPERTY OF PETITIONER WITHOUT DUE PROCESS OF LAW.

(a) The purpose and motivation of the trustee and his counsel are best shown in the Exhibits—Appendix pp. 4a-10a.

(a) The use of the referee's orders as competent and controlling—under a plea of *res judicata,* in petitions and other pleadings of the bankrupt's trustee in the State court, on February 11, 1927, March 28, 1930, September 5, 1930 and in the hearing there in 1935, upon his petitions to open the judgments, all tended to obfuscate the facts and issues involved and finally led the State court to completely frustrate and defeat the purpose of the escrow agreement between petitioner and the debtor of October 18, 1923 (prior to the bankruptcy adjudication on November 9, 1923), violate its own prior orders, fixing the *forum* to be in it and directing the trustee to follow the usual and customary procedure there for an attack upon judgment liens, and leave the fund a waif, ultimately liable perhaps to an escheat, and just judgment liens against valuable real estate still unliquidated in the hands of the trustee, reversed, *a confiscation in effect of upwards of $30,000* (cash $3,000. and $25,000 and more, in valuable factory sites at Oaks, Pennsylvania, at the confluence of Perkiomen Creek and the Schuylkill River)—all most wrongly and unjustly done to petitioner's great loss in that amount and contrary to peti-

tioner's rights, constitutional under Art. IV, Sec. 1 of the U. S. Constitution and the 5th and 14th Amendments thereto and legal, to regular and orderly procedure—not *piecemeal* presentation of a cause—and to proper use of the pleas of *res judicata,* want of consideration, laches and estoppel, under Pennsylvania's local law, as well as federal law,—

Siegfried v. Boyd, 237 Pa. 55, 59;
Pennoyer v. Neff, 95 U. S. 714, 729;
Amn. Surety Co. v. Baldwin, 287 U. S. 156, 166-169;
Thompson v. Fitzgerald, 329 Pa. 497, 505-510 affirmed in 305 U. S. 456, 466-8.

6. THE REVIEWING AND APPELLATE COURTS BELOW WOULD SEEM TO HAVE FORGOTTEN OR DISREGARDED (A) THE FUNDAMENTAL MAXIM IN EQUITY:—"EQUITY DELIGHTS TO DO JUSTICE AND NOT BY HALVES" AND (B) THE TRUE FUNCTION OF SUCH COURTS,—

1. As to the record,—

"While a court may and when justice requires it, should suggest amendments of the record, it had no right where, as here, the parties are *sui juris* and not wards of the court, to itself make such amendment, without a request of some of the parties interested and even then without giving the opposite party a hearing. *Litigation belongs to the parties and not to the court;* the latter may sustain or dismiss it, under the pleadings filed and proofs submitted by them, but beyond this he cannot properly go, without an application or consent, so long as the parties are legally competent to act for themselves."

Tasin v. Bastries, 284 Pa. 47, 54, Simpson, J.;
Mintz v. Mintz, 83 Pa. S. C. 85, 88, 89.

2. As to the function of judges:—

"We sit here and apply rules of law and procedure. But we sit here, not as umpires, while counsel play the game of litigation but because those rules of law and procedure in most cases assist us to do justice. Occasionally a strict reliance on them may do otherwise. In such a case the Court should be *astute* to see and *be quite certain* that they are bound to an unfortunate result by a technical rule such as that of *res judicata.*"

Workington H. & D. Board v. Trade Indemnity Co., 3 All Eng. R. 139.

"The erroneous construction of the law affords no basis in morals, in reason, or in law, for a conscious repetition of the same error."

Reamer's Estate, 331 Pa. 117, Stern, J.

7. THE EXERCISE OF THIS COURT'S APPELLATE JURISDICTION IS REQUIRED, NOT ONLY TO CORRECT ERRORS IN THE ORDER PRESENTLY UNDER REVIEW BUT TO MAKE SUCH A DISPOSITION OF THE CASE AS JUSTICE AND RIGHT MAY REQUIRE.

Honeyman v. Hanan, 300 U. S. 14, 25, 26;
Va.-Carolina Chemical Co. v. Kirven, 215 U. S. 252, 260;
Forsyth v. Hammon, 166 U. S. 506, 515, 520;
Palmer v. Texas, 212 U. S. 118, 129, 132.
Phoenix Finance Corp. v. In-Wisconsin Bridge Co., Op. Nov. 17, 1941 (19 Oct. Term 1941);

CONCLUSION.

Wherefore, it is respectfully submitted but earnestly urged that a writ of certiorari should issue from your Honorable Court, to examine and review this case in the U. S. C. C. A. 3d C., and "without reluctance" also to revise (*Rogers J. Johnson v. Cadillac Motor Co.*, 261 F. 878, 884-5), the errors in the lower federal and in the state courts (of Pennsylvania) that were induced by them, and thereby correct the gross miscarriage of justice, and the oppressive and unjust confiscation of property without due process of law—in "accord with the teachings of right reason and conscience" (Cardozo, "Nature of the Judicial Process" p. 137.)

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